IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 393 OF 2006
IN
SUMMONS FOR JUDGMENT NO. 242 OF 1999
IN
SUMMARY SUIT NO. 2426 OF 1998

1. Mr.Ravi Prakash Khemka of Chennai, Indian Inhabitant,
2. Mr.Rajkumar Khemka of Chennai, India Inhabitant
3. Mr.Tirupathi Kumar Khemka of Chennai, Indian Inhabitant

Nos.1 to 3, carrying on Business at 36, Wallaj Road, Chennai -600 002. .. Appellants. (Org.Defendants Nos.1,4 and 5)

V/s.

1. Bank of India, a body corporate incorporated under the provisions of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1971 being the principal Trustee of the Bank of India Mutual Fund and having its office at Jeejibhoy Towers, 24th floor, Dalal Street, Bombay 400 023.
2. Dr.Ram S.Tarneja, r/at. Mewar, Gr.Floor, 40-A, Peddar Rd.,Mumbai-400 026.
3. Mr.T.P.Karunanandan of Head office at Bank of India, Express Towers, 14th floor, Nariman Point, Mumbai-21.
4. Mr.Dr.Shashi Chand Jain, office at OCUS Ltd.,Nirmal, .. Respondents.

3rd floor, Nariman Point,)
Mumbai -400 021.)
)
5. Mr.Atul Choksi of office at)
Asian Paints (I) Ltd.,)
Nirmal 5th floor, Nariman)
Point, Mumbai - 400 021.)
)
6. Shri Karan Thapar r/at)
Bharat Starch Industries Ltd.,)
B/6/9, Commercial Centre,)
Safdarjung Enclave,)
New Delhi 110 029.)
)
7. Shri M.K.Agarwal)
r/at. Transport Corporation)
of India Ltd., 1-7-293,M.G.)
Road, Secunderabad-500 003.)
)
8. Shri R.Nagarajan, Bank of)
India, Head office at)
Express Towers, 14th floor)
Mumbai -400 021.)
)
9. Shri P.R.Yagnik, Bank of)
India, Head office at)
Express Towers, 14th floor)
Mumbai 400 021.)
)
10. BOI Asset Management Co.)
Ltd., a company incorpo-)
rated under the Companies)
Act, 1956 and having its)
registered office at)
Jeejibhoy Towers, 24th flr.)
Dalal Street, Mumbai-23.)
)
11. Mr.Ratan Kumar Khemka of)
Chennai, Indian Inhabitant)
)
12. Mr.Madhusudhan Khemka of) .. Respondents.
Chennai, Indian Inhabitant,) (Resp.Nos.1 to 10
Nos. 11 and 12 carrying on) Orig.Plaintiffs
business at 36, Wallaj Road,) Resp.Nos.11 & 12
Chennai -600 002.) Org.Def.Nos.2 & 3)

Mr. D.D.Madon with Ms.K.R.Davierwala i/by M/s. Mulla & Mulla & C.B.& Caroe Advocates for the Appellants.

Mr.Nitin Thakkar with Mr. O.A.Das for the Respondents.

CORAM : R.M.LODHA & S.A.BOBDE,JJ.

DATED : 22nd DECEMBER, 2006.

ORAL JUDGMENT : (PER R.M.LODHA,J.)

. The defendants are in Appeal, aggrieved by the order dated 5th September, 2005 whereby the learned single Judge directed the defendants to deposit a sum of Rs.80 lacs in the court within a period of 8 weeks there from; failing which it was directed that the plaintiffs will be entitled to a decree. The said order came to be passed in Summons for judgment No.242 of 1999 in summary suit filed by the plaintiffs (respondents herein).

2. The controversy arises in the circumstances, that may be briefly indicated by us immediately.

3. The defendants (appellants herein) offered to purchase from the shareholders of Skyline NEPC Limited (for short 'the Company') upto 64,66,800 fully paid up equity shares of Rs.10/- each at the rate of Rs.35.25 per share. The said offer was to remain open on all working days from 1st February 1996 to 29th February, 1996. The plaintiffs, being the registered owners of 3,84,500 equity shares of the Company, accepted the

offer made by the defendants and after complying with all the requirements set out in the letter of offer, forwarded necessary application form to the defendants. The defendants on 22nd May, 1996, through the Registrar to the said offer, informed the plaintiffs that they had accepted the plaintiffs offer for 2,33,700 equity shares and the balance shares are being returned to the plaintiffs. It is the plaintiffs case that on 22nd May, 1996 the contract for sale of 2,33,700 equity shares between the parties stood concluded. The defendants are said to have failed and neglected to make payment. Ultimately, vide communication dated 11th November, 1996, the defendants sent 2,33,700 shares back to the plaintiffs and requested them to send the remaining shares alongwith the transfer deeds and formal application when they send the money of those shares to the plaintiffs. On December 03, 1996 the plaintiffs communicated to the defendants that they have accepted 2,33,700 shares without prejudice to the remedies available to them and at the risk and responsibility of the defendants. The correspondence ensued between the parties; but nothing concrete happened and that necessitated the plaintiffs to file summary suit for the recovery of the amount of Rs.1,18,06,864.95/- together with interest on the principal sum of Rs.82,37,925/- at the rate of 21% per annum from the date of the filing of

the suit till payment/ realisation.

4. After a writ of summons was served upon the defendants, the plaintiffs took out summons for judgment, praying that the judgment be entered for the plaintiffs in the suit against the defendants for a sum of Rs.1,18,06,864.95/- together with interest on the principal of sum of Rs. 82,37,925/- at the rate of 21% per annum from the date of filing of the suit until payment /realisation. The summons for judgment was opposed by the defendants by filing reply affidavit. Interalia, the defendants challenged the very maintainability of the suit, as according to them, the suit did not fall within the purview of the Order XXXVII Rule 2 of the code of civil procedure. They also set up the case that company has ceased to function due to various extraneous reasons beyond the control of the defendants and the object of purchase of all the shares of the plaintiffs itself was defeated and the defendants are not at necessity to purchase the said shares and therefore, the question of plaintiffs claiming any amount from the defendants does not arise. In other words, the defendants pleaded frustration of the contract owing to the supervening event. The defendants also set up the case that the shares have already been returned by the defendants to the plaintiffs and the

plaintiffs were thereafter, required to return the same alongwith the transfer deeds duly signed by the authorised person on or before March, 1997 and that the shares are lying with the plaintiffs and nothing is due and payable by the defendants towards the said transaction.

5. The learned motion Judge did not find any merit in the defence of the defendants and with a view to give an opportunity to the defendants to defend the suit, by way of mercy, directed the defendants to deposit a sum of Rs.80 lacs within a period of eight weeks there from. Hence, the Appeal by the defendants.

6. It is pertinent to note here that by the interim order dated 18th of August, 2006 the operation of the impugned order remained stayed.

7. The principal thrust of the contention of Mr.D.D.Madon, the senior counsel for the appellants, for grant of unconditional leave to the defendants was on the ground that such suit was not maintainable as a summery suit under Order XXXVII Rule 2 of the code of civil procedure. He would argue that for seeking the relief by the plaintiffs, the defendants must be called upon to accept 2,33,700 shares and the relief for

payment of money simpliciter towards value of the shares would not be maintained. According to him the contract between the parties contained reciprocal promises and until the plaintiffs expressed readiness and willingness to perform his part of the contract in returning the shares, the plaintiffs would not be entitled to any relief. According to him such reliefs cannot be granted in summary suit under Order 37 Rule 2 of the code of civil procedure. Mr. Madon relied upon the brief order of the learned single Judge of this court in the case of **Girdharilal Vaid vs. Ravi Prasad & Ors., passed on December 01, 1999 in summons for judgment No. 58 of 1998.**

8. On the other hand, Mr.Nitin Thakkar, the senior counsel for the plaintiffs argued that insofar as the plaintiffs were concerned, as per the offer document, they completed all the formalities by complying with all the requirements and after signing necessary application forms, forwarded 3,84,500 equity shares to the defendants within time. Out of 3,84,500 equity shares; the defendants accepted 2,33,700 shares and 1,50,800 shares were returned on 22.05.1996. The plaintiffs, according to Mr.Nitin Thakkar, having fulfilled their promise, were entitled to claim the money from the value of these shares by way of summary suit. As regards the

retention of 2,33,700 shares by the plaintiffs Mr. Nitin Thakkar submitted that the suit shares were returned by the defendants vide communication dated 11th December, 1996, which have been kept in trust by the plaintiffs without prejudice to their remedies and at the risk and costs of the defendants. He relied upon two orders of the learned single Judge of this court to demonstrate that the suit filed by the plaintiffs was maintainable under Order 37. These judgments are : Polaroid India Pvt. Ltd. vs. Nav Nirman Co. & Ors. 2006 (1) Bom. C.R.252 and RMC Readymix (I) P.Ltd. vs. Kanayo Khubchand Motwani 2006(4) Bom. C.R.437.

9. The legal position concerning the grant of leave under Order 37 is settled by various judgements of the Supreme Court as well as this court. However, we do not intend to refer to those cases as in our view the judgement of the Supreme Court in **M/s. Mechalec Engineers & Manufacturers vs. M/s. Basic Equipment Corporation, AIR 1997 Supreme Court 577,** culls out the principles that need to be followed while considering the question for grant of leave to defend. Those principles are :

> . "(a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave

to sign judgment and the defendant is entitled to unconditional leave to defend.

. (b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

. (c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

. (d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

. (e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

Keeping in view the aforesaid principles, we now consider the defence of the defendants that the claim made by the plaintiffs could not be granted in a summary suit under order XXXVII.

10. It is not in dispute that pursuant to the offer given by the defendants for purchase of the shares of the company having face value of Rs.10/- each at a price of Rs.33.25, the plaintiffs did send 3,84,500 equity shares to the defendants within time after completing all the requisite formalities. On 22.05.1996 the defendants retained 2,33,700 shares and returned 1,50,800 equity shares to the plaintiffs. It is also not in dispute that 2,33,700 equity shares that were retained by the defendants were returned to the plaintiffs alongwith communication dated 11th November, 1996, recording thus :-

> "Please find enclosed shares certificate(s), alongwith transfer deeds(s) and form of acceptance send by you in the above offer.
>
> Total number of shares : 0233700
>
> .....
>
> We are in the process of sending you also the money for the shares to be bought from you

around March 1997.

When we send you the money, we request you to send the returned shares alongwith transfer deed(s) and form of acceptance to us."

11. The plaintiffs by a communication dated December 03, 1995 informed the defendants that 2,33,700 shares have been accepted by them without prejudice to other remedies available to them at the cost of the defendants. The plaintiffs also communicated that pending payment, the plaintiffs must be paid interest on the amount due at the rate of 25%. The defendants did not make payment of value of those shares nor the plaintiffs returned those shares to the defendants. In this suit, the plaintiffs claimed the value of 2,33,700 shares at the rate of 35.25 per share, aggregating to Rs.82,37,925/- alongwith interest. Prima facie, it appears to us that the defence raised by the defendants about the maintainability of such suit of money relating to value of equity shares, simpliciter, without the prayer that the defendants be directed to accept 2,33,700 equity shares and their readiness and willingness to return those shares to the plaintiffs, cannot be said to be devoid of merit and a summary suit

under Order 37, Rule 2 may not be maintainable. The defence of the defendants concerning the maintainability of the suit goes to the root of the matter and cannot be said to be inconsequential and moonshine. The contract contemplates reciprocal promises and even if there was breach by the defendants, the plaintiffs have to seek specific performance of the contract and for direction to the defendants to accept 2,33,700 shares initially sent by the plaintiffs to the defendants and payment thereof. Though the senior counsel for the plaintiffs submitted that this ground has not been specifically raised in reply to the summons for judgement, but on perusal of the affidavit of the defendant No.4, we are not impressed by the said argument. In paragraph 2, the defendants have specifically set up the case that the summary suit filed by the plaintiffs is not maintainable in law and deserves to be dismissed in limine on the ground that the plaintiffs' claim does not fall within the purview of Order 37 Rule 2 of the code of civil procedure.

12. As a matter of fact in similar circumstances, the single Judge of this court in Girdharilal Vaid's case (supra) by the order dated December, 01, 1999 granted unconditional leave.

13. The judgments cited by the senior counsel for the plaintiffs, may now be adverted to by us. The Polaroid India Pvt.Ltd., was the case where the suit was filed for the recovery of the amount given under leave and licence agreement towards the security deposit. Under the said leave and licence agreement, the defendant therein gave to the plaintiff the premises on leave and licence basis and on return of the premises the security deposit of Rs.1,60,00,000/- was required to be returned by the defendant to the plaintiff. In this backdrop, the defendant's case for unconditional leave to defend was not accepted by the trial Judge and the defendant was granted conditional leave on deposit of Rs.1,60,00,000/- in the court. The question of maintainability of such suit was neither raised nor considered and, therefore, we hardly find relevance of the said judgement on the point of maintainability of the suit in the facts and circumstances of the present case.

14. In another case, RMC Readymix (I) P.Ltd., the same learned Judge considered the suit filed for recovery of the sum of Rs.85,26,667/- comprising of the principal amount of Rs.50 lacs towards the security deposit and the sum of Rs.35,25,667/- towards the interest. That was also a case where under the leave

and licence agreement, the defendant granted to the plaintiffs a licence for user of a commercial premises on plaintiffs depositing a security of Rs.50,00,000/- with the defendant therein. In that case the question of maintainability of suit was raised before the learned single Judge by the defendant. However, the said contention was negatived by holding that in the judgement delivered by the learned Judge in case of Polaroid India P.Ltd., it was held that the suit was maintainable for the recovery of the security deposit and the possession of the premises could be simultaneously handed over by the plaintiffs to the court, who in turn would hand over to the defendant, if the defendant accepted claim of the plaintiff in suit.

15. We have already referred to the judgment of Polaroid India P.Ltd., above and noticed that the question of maintainability of the suit for the recovery of the security deposit was neither canvassed nor considered. Paragraph 10 of the judgment in the case of RMC Readymix (I) P.Ltd., apparently suffers from some mistake as in Polaroid India P.Ltd., there is no finding regarding the maintainability of the suit. Besides that there is no such finding in the case of Polaroid India P.Ltd, no reasoning in the judgment of RMC Readymix

India P.Ltd., is discernible as to how such suit was maintainable. The case of RMC Readymix India P.Ltd., is in no way an authority for the proposition that in a suit for recovery of amount even under leave and licence towards security deposit, without there being prayer for readiness and willingness of the plaintiffs to return the premises and without seeking specific performance of mutual and reciprocal obligations, a suit under Order XXXVII was maintainable.

16. In any case sofaras the facts of the present case are concerned, an important issue of maintainability of the summary suit has been raised by the defendants and that entitles them grant of unconditional leave to defend the suit.

17. We, accordingly, set aside the order dated 5th September, 2005 passed by the learned single Judge and grant an unconditional leave to the defendants to contest the suit.

18. The suit shall now stand transferred to commercial causes. The defendants may now file written statement within eight weeks from today. The suit shall be proceeded accordingly thereafter.

19. No costs.

(R.M.LODHA,J.)

(S.A.BOBDE,J.)

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